

Decision 05-06-062

June 30, 2005

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Establish Policies and
Cost Recovery Mechanisms for Generation
Procurement and Renewable Resource Development.

Rulemaking 01-10-024
(Filed October 25, 2001)

**ORDER GRANTING LIMITED REHEARING OF
DECISION (D.) 04-06-011 REGARDING THE OTAY MESA
POWER PURCHASE AGREEMENT, AND
DENYING REHEARING IN ALL OTHER RESPECTS**

I. INTRODUCTION

In this order, we dispose of applications filed by The Utility Reform Network. and Utility Consumers Action Network (jointly, "TURN/UCAN"), the Alliance for Retail Energy Markets ("AREM"), and the City of Chula Vista ("City") for rehearing Commission Decision (D.) 04-06-011 ("Decision").

On October 7, 2003, San Diego Gas and Electric Company ("SDG&E") filed a motion requesting Commission authorization to enter into new electric resource contracts with Comverge, Envirepel, Ramco, Palomar and Otay Mesa. (See, *Motion of San Diego Gas & Electric Company for Approval to Enter into New Electric Resource Contracts Resulting from SDG&E's Grid Reliability Capacity RFP, and for Approval of the Cost Recovery and Ratemaking Mechanisms Associated Therewith* ("SDG&E Motion"), filed October 7, 2003.) The SDG&E motion stated that the contracts were the result of a request for proposal ("RFP") issued by SDG&E to solicit bids to procure energy to meet its short- and long-term grid reliability needs.

On June 9, 2004, the Commission issued D.04-06-011, which granted SDG&E's motion, with modifications. As part of its approval, the Commission also authorized SDG&E to recover any stranded costs associated with the Ramco and Palomar

contracts from all SDG&E bundled customers who are currently ineligible for direct access.

Applications for rehearing were filed by TURN/UCAN, AReM and City. SDG&E and Calpine Corporation (“Calpine”) filed responses opposing the applications for rehearing.

II. DISCUSSION

A. **The Otay Mesa PPA should not have been considered as part of SDG&E’s RFP solicitation, but rather as a bilateral contract.**

TURN/UCAN raise two main objections to the Commission’s approval of the Otay Mesa PPA. First, they assert that SDG&E ignored its threshold criteria because the Otay Mesa PPA would not be in service by the RFP cutoff date of June 1, 2007. (TURN/UCAN’s Rhg. App., p. 16.) Next, TURN/UCAN assert that SDG&E violated its own RFP evaluation criteria by selecting Otay Mesa without demonstrating that it was superior to other options bid into the RFP. (TURN/UCAN’s Rhg. App., p. 18.) Based on these objections, TURN/UCAN maintain that we improperly concluded that SDG&E had conducted a reasonable solicitation. (TURN/UCAN’s Rhg. App., p. 13.)

Our consideration of the allegations raised by TURN/UCAN lead us to conclude that limited rehearing should be granted. Based on the evidentiary record, we should not have considered the Otay Mesa PPA a “winning bidder” of SDG&E’s RFP at all, but rather a bilateral contract to meet needs outside the scope of the RFP. SDG&E presented evidence throughout the proceeding that the Otay Mesa PPA was negotiated separately, after its grid reliability needs were met. (See, e.g., RT 52, p. 6552:9-14 (Avery testimony regarding SDG&E’s decision to pursue projects that were not necessary to meet the RFP requirements); RT 52, pp. 6582:6-21 & 6590:23 – 6591:11 (Avery testimony regarding sequence of RFP and SDG&E’s decision to pursue Calpine option after RFP needs were met).) As such, we incorrectly concluded that the Otay

Mesa PPA was the result of a competitive solicitation and reasonable under Public Utilities Code section 454.5(c)(1).¹

Although we did not use the appropriate procedure to approve the Otay Mesa PPA, we do not believe it is necessary to reject the PPA outright. SDG&E has clearly demonstrated a need for the power to be supplied by the Otay Mesa PPA. (See, e.g., RT 51, pp. 6452:26 – 6455:23 (Anderson); RT 49, p. 6077:2-8 (Lorenz); Exh. RFP-6, p. LPL-5 (Lorenz).) Furthermore, there was convincing evidence that a similar opportunity such as the Otay Mesa PPA would not likely be available in the immediate future. As the Decision notes,

“As of today, Palomar and Otay Mesa provide the only possible sources of new generation with capacity over 500 MW, in SDG&E’s service territory, that can serve SDG&E’s needs in the foreseeable future. These facilities are fully permitted, have water for cooling purposes, which helps them operate at low heat rates, and have already received the appropriate imprimatur from local and regional environmental and community groups. SDG&E’s witness hypothesized that any other new generation source comparable in size to Palomar or Otay Mesa that began to germinate as a concept today would take at least four years to come on-line.”

(D.04-06-011, p. 55.)

Since SDG&E has already established a need for the Otay Mesa PPA, we do not believe it is necessary to reconsider this issue again, as the need identified by SDG&E does not change whether the Otay Mesa PPA is the result of a competitive solicitation or a bilateral contract.² Moreover, parties to the proceeding were provided an opportunity

¹ Unless otherwise stated, all statutory references are to the Public Utilities Code.

² Events arising since the Decision was issued only serves to reinforce the need for the Otay Mesa PPA. For example, in D.04-07-028, we determined that the utilities should have more responsibility for local area reliability within their own service territories. (See D.04-07-028, pp. 7-8.) To some extent, the Otay Mesa PPA will help to meet these local reliability needs. In D.04-10-035, we accelerated the phase-in of the 15-17% planning reserve margin from January

to, and did, cross-examine SDG&E witnesses on the need for the Otay Mesa PPA, including the fact that it was not necessary to meet SDG&E's grid reliability needs. (See, e.g., RT 50, pp. 6189:15 – 6207:16 (Lorenz); RT 52, pp. 6537:2 – 6538:8 (Avery).)

Although the need for power from the Otay Mesa PPA has been demonstrated, we find that the record does not contain evidence to demonstrate that the PPA is beneficial to SDG&E ratepayers and should be considered reasonable pursuant to section 454.5(c)(3). Therefore, limited rehearing is granted for the sole basis for determining the reasonableness of the PPA, as required by section 454.5(c)(3).³ Our grant of a limited rehearing should not be considered a rejection of the PPA. Rather, by today's decision, we consider the review of the PPA for purposes of whether it should be approved or not as a matter still pending before us. This includes issues concerning reasonableness and benefits to ratepayers.

B. The Commission has authority to impose stranded cost obligations associated with new utility generation on current bundled SDG&E customers who may become future direct access or community choice aggregation customers.

In D.04-06-011, the Commission determined that “all customers of SDG&E that are currently ineligible for direct access are obligated to pay for the stranded costs of any new generation for the next ten years.” (D.04-06-011, p. 42.) Both AReM and City challenge this determination on various grounds. As discussed below, these claims are without merit.

1. Direct Access Customers

AReM maintains that neither the Public Utilities Code nor the Legislature has authorized the Commission to establish charges to collect stranded costs associated

1, 2008 to June 1, 2006. (D.04-10-035, p. 16.) Consequently, SDG&E will have a need for capacity sooner than previously anticipated.

³ Since we have determined that the Otay Mesa PPA is in actuality a bilateral contract, TURN/UCAN's assertions of legal error with respect to the Otay Mesa PPA are moot.

with new utility generation from direct access customers. (AReM’s Rhg. App., p. 6.) It asserts that pursuant to AB 117, direct access customers that received bundled service after February 1, 2001 are only responsible for their “fair share” of costs incurred by the Department of Water Resources (“DWR”). (AReM’s Rhg. App., pp. 6-7.) AReM is mistaken.

AB 117 (codified in section 366.2(d)(1)) states:

“It is the intent of the Legislature that each retail end-use customer that has purchased power from an electrical corporation on or after February 1, 2001, should bear a fair share of the [DWR’s] electricity purchase costs, *as well as electricity purchase contract obligations incurred... that are recoverable from electrical corporation customers in commission-approved rates. It is further the intent of the Legislature to prevent any shifting of recoverable costs between customers.*”

(Pub. Util. Code, § 366.2, subd. (d)(1) (emphasis added).)⁴ Had the Legislature intended to obligate direct access customers to pay only their “fair share” of DWR costs, it would not have included the phrase “as well as electricity purchase contract obligations incurred... that are recoverable from electrical corporation customers in commission-approved rates” nor stated that it was “further” the Legislature’s intent “to prevent any shifting of recoverable costs between customers.” (See, e.g., *Breshears v. Indiana Lumbermen* (1967) 256 Cal.App.2d 245, 250 (discussing plain language of statute); *People v. Baker* (1968) 69 Cal.2d 44, 50 [courts should not insert or delete words in a statute or give a different meaning to the words used].) By including these

⁴ Although AB 117 is primarily about community aggregation programs, section 366.2(d) specifically conveys the Legislature’s intent concerning the cost responsibility of each retail end-use customer who was a customer on or after February 1, 2001. The Commission has determined that this cost responsibility applies to those customers that subsequently become direct access customers (see, e.g., D.02-11-022 and D.02-12-027) or municipal departing load customers (see, e.g., D.03-07-028 and D.03-08-076). Challenges to the Commission’s interpretation of AB 117 have been denied by the California Supreme Court. (See, e.g., *Modesto Irrigation District v. Public Utilities Commission, et al.*, Case Nos. S119310, S119365, S119368,

statements, and specifically the phrase “recoverable costs,” the Legislature clearly intended retail end-use customers to be responsible for their fair share of *all* costs incurred on their behalf. This would include utility retained generation costs, as well as stranded costs associated with any new contracts entered into by the utilities at the time these future direct access customers were bundled utility customers.⁵ Otherwise, there would be unlawful cost-shifting. (See, Pub. Util. Code, §366.2, subd. (d)(1); see also, Pub. Util. Code, §451 [requiring just and reasonable cost allocation].) Thus, we acted within our authority when we determined that current bundled customers who may become future direct access customers should bear their fair share of stranded costs from the Ramco and Palomar contracts associated with their departure from bundled service.⁶

2. Community Choice Aggregation Customers

City argues that the Decision errs to the extent that Finding of Fact 19 and Conclusion of Law 8 could be interpreted as applying to future community choice aggregation (“CCA”) customers. (City’s Rhg. App., p. 5.) City asserts that imposing

S119376 (petition for writ of review denied February 18, 2004); *Strategic Energy et al. v. CPUC*, Case No. S112802 (petition for writ of review denied April 30, 2003).)

⁵ AREM also concludes that since AB 117 specified in greater detail the stranded cost obligations of CCA customers, then future DA customers must only be responsible for their “fair share” of DWR costs, since that is the only cost specified in section 366.2(d)(1). (AREM’s Rhg. App., p. 7.) This conclusion is in error. As discussed, AB 117 is primarily about community choice aggregation, a new program. Not surprisingly, the Legislature has provided more detail regarding this program than for direct access. Moreover, as discussed, section 366.2(d)(1) refers to all “recoverable costs,” not just DWR costs.

⁶ AREM had raised a similar argument in its application for rehearing of D.03-12-059, which authorized Southern California Edison Company to acquire Mountainview Power Company, LLC as a subsidiary and enter into a 30 year power purchase contract with it (“*Mountainview Decision*”). In that decision, the Commission determined that “all customers currently ineligible for direct access will be obligated to pay for stranded costs related to Mountainview for the first 10 years of its life.” (D.03-12-059, p. 35.) In denying rehearing, the Commission noted that retail customers departing to purchase power from community aggregators were responsible for their fair share of DWR and utility contract costs “stranded” by their departure and that this same principle of fairness applied to direct access customers. (See D.04-04-019, p. 17 (the stranded cost provision adopted for Mountainview “was adopted to prevent unfair cost-shifting to bundled customers, consistent with current state policy.”).)

stranded cost obligations on future CCA customers is contrary to AB 117 and unsupported by the record. (City's Rhg. App., p. 6.) These arguments are without merit. City's assertions regarding Finding of Fact 19 and Conclusion of Law 8 are based on text in the Decision stating:

“We therefore adopt the same mechanism here that we did in the Edison/Mountainview decision, D.03-12-059, whereby all customers of SDG&E that are currently ineligible for direct access are obligated to pay for the stranded costs of any new generation for the next ten years. This will insure that neither the utility, nor its bundled customers, will be forced to pay stranded costs for these generation assets in the event that new direct access is permitted.”

(City's Rhg. App., p. 5 (quoting D.04-06-011, p. 42).) City argues that a “plain reading” of this language could only mean that stranded cost obligations only apply to future direct access customers. (City's Rhg. App., p. 5.) However, it believes the language in Finding of Fact 19 and Conclusion of Law 8 could be interpreted as also imposing stranded cost obligations on future CCA customers. Therefore, City requests that the Finding of Fact 19 and Conclusion of Law 8 be clarified to state that any stranded cost obligations do not apply to future CCA customers. (City's Rhg. App., p. 6.) We disagree with City's reading of Finding of Fact 19 and Conclusion of Law 8, and therefore deny their request for clarification.

As City is aware, the direct access program, established pursuant to Assembly Bill (AB) 1890 (Stats. 1996, ch. 854), has been suspended pursuant to Water Code section 80110. The Decision's reference to the possibility that this suspension be lifted does not logically mean that the Commission only intended to impose stranded cost obligations on only future DA customers. The Decision refers to “future changes in the retail market structure.” (D.04-06-011, p. 42.) As presented by SDG&E and other parties during this proceeding, these changes are not limited to direct access, but also include customers departing to Aggregators or to publicly owned utilities. In light of these future changes, the Decision imposed the stranded cost obligation on “*all* customers of SDG&E that are currently ineligible for direct access.” (D.04-06-011, p. 42 (emphasis

added).) This would logically include future CCA customers. The fact that the Decision then refers to an existing program that is currently suspended does not mean that the stranded cost obligation only applies to those future customers. Further, the stranded cost obligation is based on whether a customer is *currently* taking bundled service from SDG&E, not from whom the customer will be taking service in the *future*.⁷ Therefore, Finding of Fact 19 and Conclusion of Law 8 are applicable to current bundled customers who may become future CCA customers.

City next argues that imposing stranded cost obligations on future CCA customers “could severely impact, if not outright eliminate, the ability of Chula Vista or any other city in SDG&E service territory to become a Community Choice Aggregator.” (City’s Rhg. App., p. 7.) It contends that such a consequence means that “the Commission will have preempted, and effectively ignored, the Legislature’s mandate in AB 117.” (City’s Rhg. App., p. 7.) City’s argument is without merit. The Decision does not prevent or prohibit City from becoming a Community Choice Aggregator (“Aggregator”). City’s decision whether it is able to become an Aggregator will be based on its own assessment of numerous factors. The Decision is not unlawful simply because it imposes stranded cost obligations that may affect City’s decision. Our interpretation is also not contrary to the Legislative mandate of AB 117. AB 117, codified in section 366.2, specifically provides

“A retail end-use customer purchasing electricity from a community choice aggregator pursuant to this section shall reimburse the electrical corporation that previously served the customer for all of the following:

...

(2) Any additional costs of the electrical corporation recoverable in commission-approved rates, equal to the share of the electrical corporation's estimated net unavoidable electricity purchase contract costs attributable to the

⁷ The Legislature’s focus was on cost-shifting, and assuring that costs incurred on behalf of all those ineligible for DA could not be avoided by a customer simply by departing the system. (See, Pub. Util. Code, §366.2, subd. (d)(1).)

customer, as determined by the commission, for the period commencing with the customer's purchases of electricity from the community choice aggregator, through the expiration of all then existing electricity purchase contracts entered into by the electrical corporation.”

(Pub. Util. Code, §366.2, subd. (f)(2).) Electricity purchase contracts are not limited only to those instances where a utility purchases electricity, but can include contracts for turnkey operations.⁸ The Ramco and Palomar contracts are “necessary to enable SDG&E to meet its electric grid reliability capacity needs and reserve margin requirements during 2005 – 2007.” (*SDG&E Motion*, p. 2.) Therefore, CCA customers who are bundled customers during the period these grid reliability and reserve margin requirements are acquired should be required to pay their fair share of stranded costs associated with their departure from bundled service. This is consistent with the provisions of section 366.2(f)(2).

The record also supports our determination that future CCA customers should bear responsibility for their fair share of any stranded costs associated with the Ramco and Palomar contracts. The *SDG&E Motion* specifically addresses the risks associated with its acquisition of the Ramco and Palomar facilities.

“This chaotic and every-changing energy environment has caused, and is causing, constant recalibration of state and Commission policies toward the present and future rights and obligations of investor-owned utilities, providers of DA, community aggregators, local jurisdictions proposing municipalization, and other stakeholders in the energy service industry. . . . [T]he current substantial uncertainty surrounding state and federal energy policy, the lack of clear legislative direction on recovery of investment in generation assets as compared to purchase power contracts, the considerable uncertainty pertaining to the stability of

⁸ In a contract for a turnkey operation, the developer is responsible for building the power plant and preparing it for commercial service. Once the plant is completed and ready for commercial service, the utility will purchase the plant from the developer. The utility, as owner of the plant, will then determine when to operate the plant and the amount of energy to be generated.

SDG&E's future retail customer base, and the general risks inherent in the ownership and operation of major generation facilities above and beyond the risks associated with electric distribution facilities require that utility investment in new generation be strongly supported . . . [to ensure] the full recovery of all capital and operating costs over the life of the generation investment.”

(*SDG&E Motion*, pp. 27-28 (emphasis in original).) In their testimony and briefs, TURN/UCAN also advocated that all current bundled SDG&E customers who could become future DA or CCA customers should bear an ongoing responsibility for any costs that were incurred on their behalf while they were taking bundles service. (See, e.g., Ex. RFP-59 (Woodruff), pp. 5, 41-45; *Concurrent Brief of The Utility Reform Network and the Utility Consumers Action Network on the Motion of San Diego Gas & Electric Company for Approval to Enter into New Electric Resource Contracts*, March 8, 2004, pp. 82-85.) The Decision also refers to “future changes to the retail market structure” as a basis for imposing stranded costs obligations. As noted above, community choice aggregation was identified as a “future change” in the current retail energy market. Therefore, our determination to impose stranded cost obligations on future CCA customers is supported by the record.

City further contends that the Commission must defer a decision on the *SDG&E Motion* until after “the implications of Chula Vista’s (and any other city’s) intent to become a Community Choice Aggregator can be factored into SDG&E’s long-term resource planning.” (City’s Rhg. App., p. 8.) It believes that to approve the contracts at this time would prejudge issues under consideration by the Commission in Rulemaking (R.) 03-10-003 which implements the CCA program. City is incorrect. As an initial matter, this decision does not address SDG&E’s long-term procurement of energy, but rather SDG&E’s immediate need to ensure reliability of its electric grid. Therefore, a city’s intent to possibly become an Aggregator some time in the future is not relevant to

SDG&E's current grid reliability needs.⁹ Further, consideration of factors that may potentially affect a city's determination to become an Aggregator is outside the scope of a procurement proceeding. Rather, it should be considered as part of R.03-10-03.

Consequently, there is no reason for us to delay action on the *SDG&E Motion*.¹⁰

Finally, our determination that CCA customers should be obligated to bear some responsibility for potential stranded costs from these contracts is a separate issue from determining the fair share amount of those costs to be borne by these customers. This Decision only addresses the former, the issue of responsibility/liability, while the latter, issues of cost allocation, is still to be determined in R.03-10-003. At the time we determine City's fair share of these costs, City will have the opportunity to present evidence regarding allocation of costs among different types of customers. Thus, there is no prejudgment.

C. Commissioner Peevey's participation in voting on the *SDG&E Motion* does not violate due process.

On April 26, 2004, TURN/UCAN filed a motion requesting that Commissioner Peevey be recused from voting on any decision resulting from SDG&E's RFP on the grounds that he allegedly had personal involvement in the contract negotiations between SDG&E and Calpine. TURN/UCAN asserted that this alleged involvement rendered him incapable of making an impartial decision with respect to whether to approve the Otay Mesa PPA. (See *Motion of The Utility Reform Network and*

⁹ Moreover, City's assertion that "SDG&E will no longer need to provide power for up to 9% of its current load" when City becomes a community choice aggregator is speculative at best. Further, the issue is about grid reliability, and not about who will become a community choice aggregator. Because the utilities are the providers of last resort, the utilities must purchase electricity in response to this reliability requirement.

¹⁰ City also states that it may "have to consider its permitting and legal options concerning the construction of the Ramco facility and facilities necessary to provide the transmission of power from the Otay Mesa project" if the Commission does not grant its rehearing request. (City's Rhg. App., p. 8.) City appears to be insinuating that even if there is no basis for finding legal error, rehearing must be granted or else it will undermine the approved contracts. By resorting to threats, City has undercut its legal challenge to the Decision.

the Utility Consumers Action Network Seeking the Recusal of Commission President Peevey, filed April 26, 2004.) TURN/UCAN's motion was denied in an Assigned Commissioner's Ruling ("ACR") on May 25, 2004 on the grounds that TURN/UCAN had mischaracterized the nature of Commissioner Peevey's involvement in the negotiations and failed to demonstrate that he had an unalterably closed mind with regard to the outcome of the Otay Mesa PPA. (*Assigned Commissioner's Ruling Denying Motion of The Utility Reform Network and the Utility Consumers Action Network Seeking the Recusal of Commission President Peevey ("May 25 ACR")*, filed May 25, 2004, pp. 2-3.) This ACR was subsequently affirmed by the full Commission in D.04-06-011. (D.04-06-011, p. 72.)

In their rehearing application, TURN/UCAN again maintain that Commissioner Peevey should not have been permitted to vote on the Decision because of his alleged involvement in the contract negotiations between SDG&E and Calpine. (TURN/UCAN's Rhg. App., p. 4.) They assert that permitting Commissioner Peevey to vote on whether to approve the Otay Mesa PPA contract between SDG&E and Calpine constituted a violation of due process because he was no longer an impartial decision-maker. (TURN/UCAN's Rhg. App., p. 3.) Moreover, they argue that the Commission applied the wrong standard in determining whether Commissioner Peevey's involvement raised due process concerns.

TURN/UCAN's due process challenge turns on their assertion that approval of the *SDG&E Motion* is adjudicatory, rather than quasi-legislative, for disqualification purposes because "the Commission sought to ensure that the results of the SDG&E grid reliability RFP conformed to the existing policies." (TURN/UCAN's Rhg. App., p. 8.) Consequently, they assert that the ACR should not have used the "unalterably closed mind" standard applicable in quasi-legislative proceedings to determine whether recusal was warranted. Instead, TURN/UCAN assert that the appropriate standard is whether Commissioner Peevey's actions demonstrated a "prejudgment of disputed issues of fact." (TURN/UCAN's Rhg. App., pp. 9-11.) These assertions are without merit.

The level of impartiality required of an agency decision-maker varies depending upon the nature of the proceeding. The standard for impartiality is least strict in “quasi-legislative” proceedings, and most strict in “adjudicatory” proceedings. Although this proceeding was categorized as “ratesetting,” this is not dispositive for due process purposes. (Cf., *Marathon Oil Company v. Environmental Protection Agency* (9th Cir. 1977) 564 F.2d 1253, 1264.) In this instance, TURN/UCAN fail to demonstrate that approval of the *SDG&E Motion* should be considered adjudicatory for purposes of impartiality analysis. Further, they fail to demonstrate that even under such a categorization, California law would necessarily require a stricter standard of impartiality.

As an initial matter, the cases relied on by TURN/UCAN to establish that this proceeding is “adjudicatory” are not on point. *Horn v. County of Ventura* (1979) 24 Cal.3d 605, 612-613 considered whether granting a zoning permit was adjudicatory for purposes of determining whether evidentiary hearings and notice were required. *Patterson v. Central Coast Regional Com* (1978) 58 Cal.App.3d 833, 839, and *Pacifica Corp. v. City of Camarillo* (1983) 149 Cal.App.3d 168, 175, concerned the determination of whether certain land use decisions were adjudicatory or legislative for purposes of establishing the proper standard for judicial review. Thus, these cases simply establish what would be considered “adjudicatory” for purposes of determining whether evidentiary hearings are required and whether the proceeding is quasi-legislative or adjudicatory for purposes of deciding whether administrative mandamus (Code Civ. Proc, §1094.5) or ordinary mandamus (Code Civ. Proc., §1085) applies. However, they are not dispositive as to determining whether a proceeding is “adjudicatory” for purposes of determining disqualification of a decision-maker. Accordingly, TURN/UCAN have failed to demonstrate that this proceeding should be considered “adjudicatory” for purposes of establishing the level of impartiality required.

Further, for purposes of determining the disqualification standard, this proceeding should more appropriately be considered quasi-legislative in nature. In this proceeding, we considered whether to approve certain procurement contracts pursuant to

section 454.5. As such, this is a forward-looking, not backward-looking, proceeding and, thus, cannot involve the imposition of penalties for past behavior. Additionally, approval of a procurement contract entails consideration of various judgmental policy factors, including whether the contracts would permit SDG&E to achieve a balanced resource portfolio, provide benefits to ratepayers and achieve the state's goals of providing cleaner and more efficient power. (D.04-06-011, pp. 55 & 65.) These policy considerations are clearly matters for disposition in quasi-legislative proceedings.

In a quasi-legislative proceeding, a decision-maker can be disqualified from voting upon a "clear and convincing showing that the agency member has an unalterably closed mind on matters critical to the disposition of the proceeding." (*Association of Nat. Advertisers, Inc. v. F.T.C.* ("ANA") (D.C. Cir. 1979) 627 F.2d 1151, 1170.) In their rehearing application, TURN/UCAN point to "evidence" which demonstrates that Commissioner Peevey and Legal Division staff had some prior involvement in contract negotiations between SDG&E and Calpine. (TURN/UCAN's Rhg. App., pp. 4-5.) This, however, does not meet the "clear and convincing showing" required by the courts, since TURN/UCAN have not demonstrated that Commissioner Peevey had already made up his mind and was not receptive to the evidence presented. At best, TURN/UCAN have demonstrated that Commissioner Peevey favored the concept of a 10-year PPA, not that he had established or advocated the terms and conditions of the contract presented to the Commission. Moreover, as TURN/UCAN's own witness conceded, there was nothing wrong with Commissioner Peevey encouraging SDG&E and Calpine to enter into a PPA. (RT 53, pp. 6817:17 – 6818:2 (Woodruff).) Finally, since Commissioner Peevey's involvement was before evidentiary hearings, he still had time to change his mind. (See, *Housing Study Group v. Kemp* (D.C. Cir. 1990) 736 F.Supp. 321, 333.) In fact, Commissioner Peevey's vote supporting a decision that denies certain conditions that SDG&E considered necessary before entering into the Otay Mesa PPA demonstrates that he had not prejudged the Otay Mesa PPA and did make his decision based on evidence in

the record.¹¹ Based on these facts, there was no basis to disqualify Commissioner Peevey and we properly affirmed the May 25 ACR.

Finally, *assuming arguendo* that this proceeding was adjudicatory in nature at least for some purposes, there is still no basis to assume that a stricter standard of impartiality should be applied. The cases cited by TURN/UCAN for supporting a stricter standard are distinguishable from the current situation. (See TURN/UCAN's Reh'g App., pp. 11-13, citing to *Nightlife Partners v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, *Golden Day Schools, Inc. v. State Dep't of Education* (2000) 83 Cal.App.4th 695, and *Gai v. City of Selma* (1998) 79 Cal.Rptr.2d 910). Those cases concern imposition of penalties for prior bad acts where the individual's livelihood are at stake. Additionally, the issues presented in those cases concerned a lack of separation between the prosecutory and adjudicatory functions of decision-makers. Clearly, a stricter standard of impartiality is required in those instances. However, the mere fact that there is an overlap, with a single person performing both prosecutory and adjudicatory functions, does not automatically result in a due process violation. (*Withrow v. Larkin* (1975) 421 U.S. 35, 52.) In this case, there is no overlap of functions, and we are not considering past conduct. Rather, we are deciding whether to approve future contracts for the procurement of energy, taking into consideration certain policy considerations. Thus, the "unalterably closed mind" standard articulated in *ANA* would be more appropriate in this instance, rather than the "appearance of bias" standard proposed by TURN/UCAN.

TURN/UCAN also contend that the Commission erred in ratifying the May 25 ACR. (TURN/UCAN's Rh'g. App., p. 13.) However, TURN/UCAN fail to specifically explain their grounds for asserting error, and thus, have not complied with section 1732 requirements or Commission Rule 86.1. (See Pub. Util. Code, §1732; Code of Regs, tit. 20, §86.1.) Commissioner Peevey is the assigned commissioner to this

¹¹ Thus, even under the stricter standard of "prejudgment of disputed issues of fact," Commissioner Peevey would not have been disqualified.

proceeding and the Commission properly ratified his May 25 ACR pursuant to section 310. Accordingly, TURN/UCAN's contention is without merit.

For these reasons, we find that there has been no due process violation. TURN/UCAN's request for rehearing of this issue is therefore denied.

D. AReM's request for clarification is denied.

D.04-06-011 responded to concerns raised by parties regarding potential stranded costs associated with the Ramco and Palomar contracts by deciding to "adopt the same mechanism [] that we did in the Edison/ Mountainview decision, D.03-12-059 whereby all customers of SDG&E that are currently ineligible for direct access are obligated to pay for the stranded costs of any new generation for the next ten years." (D.04-06-011, p. 46; see also D.04-06-011, p. 75 (FOF 19).) AReM notes that the Commission's use of the term "any new generation" could be interpreted as authorizing SDG&E to impose cost obligations on direct access customers for stranded costs associated with contracts and new investments other than the Ramco and Palomar contracts. Thus, it requests that the Decision be clarified specifically limit SDG&E's authorization to recover only stranded costs associated with the Ramco and Palomar contracts. (AReM's Rhg. App., p. 8.) Absent such clarification, AReM asserts that rehearing must be granted as parties were not provided notice and opportunity to comment on the Commission's adoption of "a general policy in this proceeding concerning the stranded cost obligations of departing customers." (AReM's Rhg. App., p. 8.)

AReM's interpretation of these statements is incorrect and unreasonable. The Decision clearly addresses only the stranded cost obligations associated with the Ramco and Palomar contracts, not other new investments.¹² As part of our discussion to impose this obligation, we reiterated our continuing policy to prevent unfair cost shifting

¹² Further, the Decision clearly states in the beginning that "for the two turn-key projects, Ramco and Palomar, all customers of SDG&E that are currently ineligible for direct access are obligated to pay for stranded costs of these generation projects for the next ten years." (D.04-06-011, p. 6.)

to utility customers. (See D.04-06-011, p. 79 (COL 8).) We have articulated this policy in numerous decisions, including the *Mountainview* Decision and our most recent decision approving the utilities' long-term procurement plans (D.04-12-048). This policy is consistent with the Legislature's intent to protect bundled customers from cost-shifting. (See, Pub. Util. Code, §366.2, subd. (d)(1).) Clearly, we will authorize recovery of stranded costs if it is warranted to prevent unfair cost shifting, and there is no error in reminding parties of this policy. AReM has read the statement out of context. Accordingly, we do not believe any clarification to the Decision is warranted.

III. CONCLUSION

Based on our consideration of TURN/UCAN's arguments regarding the Otay Mesa PPA, we find that we erred in approving the PPA as the result of a competitive solicitation. The evidentiary record demonstrates that the Otay Mesa PPA was in fact a bilateral contract between SDG&E and Calpine. Accordingly, for the reasons discussed above, we grant limited rehearing for the sole purpose of determining whether the Otay Mesa PPA provides ratepayer benefits and is reasonable pursuant to Public Utilities Code section 454.5(c)(3). Rehearing of all issues raised by TURN/UCAN, AReM and City is denied.

IT IS ORDERED that:

1. Limited rehearing of D.04-06-011 is granted to determine whether the Otay Mesa PPA provides ratepayer benefits and is reasonable pursuant to Public Utilities Code section 454.5(c)(3).
2. Review of the Otay Mesa PPA for purposes of whether it should be approved or not as a matter still pending before us.
3. Rehearing of D.04-06-011 is denied in all other respects.

This order is effective today.

Dated June 30, 2005, San Francisco, California.

MICHAEL R. PEEVEY
President
GEOFFREY F. BROWN
SUSAN P. KENNEDY
DIAN M. GRUENEICH

Commissioner John A. Bohn, being necessarily
absent, did not participate.